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No. 77-609

In the

Supreme Court of the United States

OCTOBER TERM, 1977

FRANK ANDRE, et al.,

Petitioners,

vs.

BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, COOK COUNTY, ILLINOIS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case involves a challenge to an ordinance of the Village of Maywood which requires Village officers and employees to establish residency within the Village. The ordinance, Village of Maywood Ordinance No. CO-75-9, was enacted on August 14, 1975, and is entitled "An Ordinance Establishing Residency Requirements for Present Employees and Present Officers of the Village of Maywood."

The ordinance applies to officers and employees who resided outside the Village at the time the ordinance was adopted. It requires administrative personnel and department heads to establish residency within the Village within two years from the date of adoption. All other employees are required to establish residency within four years from the date of adoption.

The complaint in this case challenged the constitutional validity of the ordinance. The plaintiffs are all either police officers or firefighters who resided outside the Village. The defendants are the Village of Maywood, the Board of Trustees of the Village, the Village President and the six individual members of the Board of Trustees. (The complaint is set forth in the Appendix.)

The complaint alleges that the challenged ordinance violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and also violates Article I, Section 10's prohibition against the enactment of ex post facto laws and laws which impair the obligation of contracts.*

The complaint does not allege that the plaintiffs' employment contracts with the Village expressly provided that the plaintiffs would be permitted to reside outside the Village during the period they are employed or serve as officers of the Village. Neither did the complaint allege that any of the defendants or any other Village official ever had affirmatively represented to any of the plaintiffs that the plaintiffs would be permitted to reside outside the Village during their tenure as Village officers or employees.

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* The complaint also alleged that the ordinance was void for vagueness and overbreadth. The plaintiffs, however, did not raise these issues before the Court of Appeals.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the defendants filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Both sides filed briefs and memoranda in the District Court in support of their position on this motion.

While the defendants' motion to dismiss was pending and after all briefs and memoranda had been submitted, the plaintiffs filed a motion to join as additional plaintiffs two Village employees who were not officers of the Village and who were not members of the Village's police or fire department. This motion to join additional plaintiffs was made on January 24, 1976 and was granted the same date.

On February 4, 1977, the District Court for the Northern District of Illinois, Judge George N. Leighton presiding, announced that the defendant's motion to dismiss would be granted and that a memorandum opinion would be issued. On March 4, 1977, Judge Leighton issued a memorandum order which stated that a memorandum opinion would not be issued because such an opinion was unnecessary due to the fact that the controlling principles of law had been exhaustively discussed in a memorandum opinion of Judge Bernard M. Decker, issued in the case of *Cook County Teachers Union Local 1600, et al.* v. *John W. Taylor, et al.*, ... F. Supp. ..... (76C-3229) (N.D. Ill. 1977).

The plaintiffs appealed Judge Leighton's order to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals in an opinion issued July 27, 1977, and reported at 561 F.2d 48, affirmed the District Court's decision dismissing the complaint.

The plaintiffs on October 28, 1977, filed a petition for a writ of certiorari with the Clerk of this Court.

ARGUMENT

PRELIMINARY STATEMENT

This case does not present any new or unsettled questions of federal law. The decision of the District Court dismissing the petitioners' complaint and the Court of Appeals' decision affirming the District Court were in accordance with established principles of constitutional law. The decisions were consistent with the decisions of this Court and other courts which have considered the constitutional validity of residency requirements for municipal employees. *See, e.g. McCarthy* v. *Philadelphia Civil Service Commission,* 424 U.S. 645, 96 S.Ct. 1154 (1976). The arguments made in the Petition for a Writ of Certiorari either have been made before and decisively determined or are based on the premise that the petitioners possess a right which they do not have.

I.

RESIDENCY REQUIREMENTS FOR PUBLIC EMPLOYEES HAVE CONSISTENTLY BEEN HELD NOT TO VIOLATE THE FOURTEENTH AMENDMENT.

This Court has considered and upheld the validity of municipal residency requirements in two cases; *McCarthy* v. *Philadelphia Civil Service Commission,* 424 U.S. 645, 96 S.Ct. 1154 (1976), and *Detroit Police Officers Association* v. *City of Detroit,* 405 U.S. 950, 92 S.Ct. 1173 (1972). In *McCarthy,* the validity of a municipal regulation which required employees of the City of Philadelphia to reside within that City was upheld. This court ruled that the regulation was "not irrational" and hence did not violate the Fourteenth Amendment's guarantees of due process and equal protection. The *McCarthy* decision

specifically held that the residency requirement did not violate the plaintiff's constitutional right to interstate travel. The plaintiff was a Philadelphia firefighter who resided in New Jersey.

In *Detroit Police Officers Association* v. *City of Detroit,* the appeal was dismissed for want of a substantial Federal question. The appeal in question was from a decision of the Michigan Supreme Court, which upheld the validity of a city ordinance that imposed a residency requirement on city employees.

In addition to the decisions of this court, there have been numerous decisions by state supreme courts and lower federal courts which have upheld the validity of municipal residency requirements. *See, e.g., Wardwell* v. *Board of Education of the School District of the City of Cincinnati,* 529 F.2d 625 (6th Cir., 1976), *Wright* v. *City of Jackson,* 506 F.2d 900 (5th Cir. 1975), *Ector* v. *City of Torrance,* 10 Cal. 3d 129, 514 P.2d 433, (1973), cert. denied. 415 U.S. 935, 94 S.Ct. 1451 (1974), *Hattiesburg Firefighters Local 184* v. *City of Hattiesburg,* 263 So. 2d 767 (Miss., 1972), *Salt Lake City Firefighters Local 1645* v. *Salt Lake City,* 22 Utah 2d 115, 449 P.2d 239 (1969), cert. denied 395 U.S. 906, 89 S.Ct. 1948, (1969). Significantly, the Petition for a Writ of Certiorari does not cite even one decision which held a municipal residency requirement to be invalid.

The Petitioners attempt to distinguish all the cases upholding municipal residency requirements on the grounds that the ordinance challenged in this case imposes a residency requirement on present Village employees who reside outside the Village. This argument ignores the fact that the ordinance which was challenged in *Detroit Police Officers Association* v. *City of Detroit,*

applied to all City employees present and future. *See, Detroit Police Officers Association* v. *City of Detroit,* 385 Mich. 519, 190 N.E.2d 97 (1971). This court's decision dismissing the appeal in *Detroit Police Officers Association* v. *City of Detroit,* 405 U.S. 950, 92 S.Ct. 1173 (1972), for want of a substantial federal question was a decision on the merits which held that the ordinance did not violate the equal protection and due process clauses of the Fourteenth Amendment. *McCarthy* v. *Philadelphia Civil Service Commission,* 424 U.S. 645, 96 S.Ct. 1154 (1976), *Ahern* v. *Murphy,* 457 F.2d 363 (7th Cir., 1972). If no substantial federal question was raised because the ordinance in *Detroit Police Officers Association* applied to present City employees, then no substantial federal question is raised by the fact that the challenged Maywood ordinance applies to present Village employees.

Furthermore, there have been decisions by both State supreme courts and a federal court of appeals upholding the constitutional validity of ordinances which impose residency requirements on present municipal employees. In *Wright* v. *City of Jackson,* 506 F.2d 900 (5th Cir., 1975), the court upheld the constitutionality of an ordinance which required present city civil service employees who resided outside the city to move their domicile and principal place of residence into the city within 12 months. This is just what the challenged Maywood ordinance does except that instead of 12 months, it gives present Village employees who resided outside the Village at the time the ordinance was adopted at least two years to establish residency within the Village.

Likewise in *Hattiesburg Firefighters Local 184* v. *City of Hattiesburg,* 263 So. 2d 767 (Miss., 1972), the Mississippi Supreme Court upheld the constitutionality of an ordinance requiring all city service employees to move into

the city within 60 days. In *Salt Lake City Firefighters Local 2645* v. *City of Salt Lake City,* 22 Utah 2d 115, 449 P.2d 239, cert. denied 395 U.S. 906, 89 S.Ct. 1748 (1969), the Utah Supreme Court held valid an ordinance which required certain city employees who resided outside the city to establish residency in the city within a two-year period.

As a result of the dismissal for want of a substantial federal question in *Detroit Police Officers Association* v. *City of Detroit* and the decisions in *Wright* v. *City of Jackson, Hattiesburg Firefighters Local 184* v. *City of Hattiesburg* and *Salt Lake City Firefighters Local 2645* v. *City of Salt Lake City,* both this Court and other courts have determined that an ordinance requiring present municipal employees who live outside a municipality to establish residency within the municipality is constitutionally valid.

II.

THE DECISIONS OF THIS COURT CLEARLY ESTABLISH THAT THE CHALLENGED ORDINANCE DOES NOT VIOLATE THE PETITIONERS' CONSTITUTIONAL RIGHT TO TRAVEL.

In *McCarthy* v. *Philadelphia Civil Service Commission,* 424 U.S. 645, 96 S.Ct. 1154 (1976), this Court expressly stated that a requirement that employees reside within a municipality as a condition of their employment is a bona fide residency requirement. The challenged Maywood ordinance imposes such a bona fide residency requirement. It requires present Village employees and officers to establish and maintain residency within the Village as a continuing condition of their employment.

Bona fide residency requirements which require an individual to be a resident while working for a municipality or while receiving governmental benefits are to be distinguished from durational residency requirements. Durational residency requirements require an individual to live within a particular jurisdiction in order to qualify for governmental benefits or to exercise rights granted by the government.

This court has held that durational residency requirements deprive an individual of his constitutional right to interstate travel. *See, Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969), where a one-year residency requirement for welfare recipients was struck down, *Dunn* v. *Blumstein,* 405 U.S. 330, 92 S.Ct. 995 (1972), which held invalid a requirement that a person reside within the State of Tennessee for a year before being eligible to vote and *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 94 S.Ct. 1076 (1974), which held invalid a requirement that a person reside within a county for a year in order to be eligible to receive free treatment at the county's hospital for the indigent.

In these decisions, a distinction was made between bona fide and durational residency requirements. In *Dunn* v. *Blumstein,* it was stated:

> Nothing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residency requirements. 405 U.S. at 342, Note 13.

This language was quoted in *Memorial Hospital* v. *Maricopa County.*

McCarthy v. *Philadelphia Civil Service Commission,* 424 U.S. 645, 96 S.Ct. 1154 (1976), held that bona fide residency requirements for municipal employees did not deprive municipal employees of their constitutional right to interstate travel. The *McCarthy* opinion states:

> In this case appellant claims a constitutional right to be employed by the City of Philadelphia *while* he is living elsewhere. There is no support in our cases for such claim. (Emphasis in original) 424 U.S. at 646.

The petitioners also argue that the challenged ordinance deprives them of their constitutional right to intrastate travel. They, however, cite no decisions of this court establishing that such a right exists under the federal constitution. The cases they do cite each involves durational, not bona fide, residency requirements. In *Wellford* v. *Battaglia,* 393 F. Supp. 143 (D. Del. 1972), affirmed 485 F.2d 1151 (3rd Cir. 1975), the court held invalid a provision in a city charter which required a person to be a resident of the city for five years to be eligible to run for mayor. In *King* v. *New Rochelle Memorial Housing Authority,* 442 F.2d 646 (2d Cir. 1971), cert. denied, 404 U.S. 863, 92 S.Ct. 113 (1971), a five-year residency requirement to be eligible for public housing was struck down. In *Eggert* v. *City of Seattle,* 18 Wash. 2d 840, 505 P.2d 801 (1973), the court struck down a city charter provision granting preference in hiring for certain city positions to persons who had resided in the city or county for a period of at least one year.

The petitioners also contend that an individual has a constitutional right to live wherever he chooses and that the challenged ordinance infringes on this right. There are no cases establishing such a right. Significantly, the only cases cited by petitioners in support of the existence of such a right involved the right of a married couple

to use contraceptives, *Griswold* v. *Connecticut,* 381 U.S. 479, 85 S.Ct. 1678 (1965), and the right of the State of Louisiana to regulate an insurance contract made outside that state between parties who did not reside in Louisiana. *Allgeyer* v. *Louisiana,* 165 U.S. 578, 17 S.Ct. 427 (1897).

Unlike the decision of a married couple to use contraceptives, the choice of where one lives is not an inherently private decision because of the possible effect it may have on others. This is part of the rationale underlying the use of zoning restrictions and was recognized by this court in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 94 S.Ct. 1536 (1974). In *Village of Belle Terre,* a zoning ordinance which prohibited more than two unrelated persons from living together in one dwelling unit was upheld. This ordinance obviously prevented the six unrelated persons who were cited for violating it from living where they chose.

Also, the California Supreme Court in upholding a municipal residency requirement, *Ector* v. *City of Torrance,* 10 Cal. 3d 129, 514 P. 2d 433 (1973), cert. denied 415 U.S. 935, 94 S.Ct. 1451 (1974), expressly rejected an employee's claim that the residency requirement violated his right to choose where and how to live.

III.

PETITIONERS DO NOT HAVE A VESTED RIGHT TO LIVE OUTSIDE THE VILLAGE OF MAYWOOD.

The Petition for a Writ of Certiorari asserts that the challenged ordinance is unconstitutional because it deprives the petitioners of their vested right to reside outside the Village of Maywood. Yet when the allegations in the petitioners' complaint and the relevant principles of law are examined, it is clear that the petitioners do

not have any vested right to reside outside the Village and at the same time hold office or be employed by the Village.

The complaint does not allege that the petitioners' employment contracts with the Village expressly provide that the petitioners can reside outside the Village. Nor does the complaint allege that any Village official ever affirmatively represented to any of the petitioners that they would be permitted to reside outside the Village while employed or holding office with the Village.

Rather, the petitioners assert that their vested right is derived from a now repealed provision of the Maywood Personnel Code. The provision in question, Section I(B)(2) of the Personnel Code provided:

> In hiring new employees, preference will be given Maywood residents—all other factors being equil (sic). If qualified village residents do not apply, then non-residents may be employed in any position.

Significantly, this provision does not state that Village employees who live outside the Village at the time they are hired shall continue to have the right to reside outside the Village during the tenure of their employment. All the provision states is that in hiring new employees, preference will be given to Maywood residents but that if a non-resident of the Village is better qualified, then the non-resident may be hired.

Even if this provision could be read as permitting employees to reside outside the Village, it would not confer any vested right on the petitioners. It is a well-established principle of Illinois law that a person does not have a vested right in the continued existence of a public law. In *People ex rel. Eitel* v. *Lindheimer,* 371 Ill. 367,

21 N.E.2d 318 (1939), appeal dismissed for want of a substantial federal question, 308 U.S. 505, 60 S.Ct. 111 (1939), rehearing denied, 308 U.S. 636, 60 S.Ct. 137 (1939) the Illinois Supreme Court stated that a vested right:

> . . . must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. 371 Ill. at 373.

In *People ex rel.* v. *Eitel* v. *Lindheimer,* the court ruled that a taxpayer did not have a right to a refund of money erroneously paid for taxes because the statute which had given the taxpayer such a right had been repealed. Identical language was used by the Illinois Supreme Court in the cases of *People ex rel. Foote* v. *Clarke,* 283 Ill. 221, 119 N.E. 321 (1918), and *Smith* v. *Hill,* 12 Ill. 2d 588, 147 N.E.2d 321 (1957).

In *Dodge* v. *Board of Education of the City of Chicago,* 364 Ill. 547, 5 N.E.2d 84 (1936), the Illinois Supreme Court ruled that an amendment to a law which reduced the annuities of retired teachers from between $1,000 and $1,500 to $500 and which was applicable to teachers who had already retired did not deprive the retired teachers of a vested right. The court again stated that a vested right must be more than a mere expectancy based on the continued existence of a law. This Court affirmed the Illinois Supreme Court's decision holding that the reduction in the amount of the retired teachers' annuities did not deprive these teachers of a vested right in violation of the United States Constitution. *Dodge* v. *Board of Education of the City of Chicago,* 302 U.S. 74, 58 S.Ct. 98 (1937).

To the extent that Section I(B)(2) of the Maywood Personnel Code permitted Village employees to reside outside the Village, it has now been repealed. Therefore, in asserting that Section I(B)(2) provides them with the right to reside outside the Village, the petitioners are asserting that they still have this right despite the fact that Section I(B)(2) has been repealed. Clearly, if the retired teachers in *Dodge* v. *Board of Education,* did not have a right to the higher annuity payments, then because Section I(B)(2) has been repeated, it no longer provides the petitioners with the right to reside outside the Village.

At best, what the petitioners had was an expectancy that Section I(B)(2) of the Personnel Code would remain in force while they were employed by the Village. Indeed, paragraph 14 of the petitioners' complaint recognizes this. It states:

> Plaintiffs, and the class represented thereby, accepted their offer of employment and commenced and continued said employment upon the *expectancy* and in reliance that no such residency has been, was, or would thereafter be required as a term and condition of further, future and continued employment. (Emphasis added).

As established by the cases cited above, petitioners' expectation that they would be permitted to reside outside the Village in the future because they had been permitted to reside outside the Village in the past did not provide them with a vested right.

If the petitioners have a vested right to reside outside the Village, this right must be derived from some source other than Section I(B)(2) of the Personnel Code. The petitioners do not derive a vested right to reside outside

the Village from their employement contracts with the Village. As stated above, the petitioners do not allege that their contracts with the Village expressly provide them with the right to reside outside the Village.

The petitioners cannot argue that a provision giving them the right to reside outside the Village is an implied covenant to their contracts with the Village. An implied covenant is one which is necessary for the performance of a contract and which would have been incorporated into the contract at the time the contract was made had it been considered by the parties. *Cowles* v. *Morris & Co.*, 330 Ill. 11, 161 N.E. 150 (1928); *O'Fallon Development Co.* v. *Reingold,* 69 Ill. App. 2d 169, 216 N.E.2d 9 (1966). Because an employment contract can exist and be performed absent the existence of a provision in it relating to the residency of the employee, the law will not imply from the fact that the petitioners were permitted to reside outside the Village when they were hired that the petitioners have an implied contractual right to continue to reside outside the Village

Furthermore, the petitioners do not derive a vested right to reside outside the Village because of promissory estoppel. Illinois law does recognize the doctrine of promissory estoppel. However, for the doctrine to be applicable, there must have been a promise or an affirmative representation made by the party against whom the estoppel is being asserted. *See, Dill* v. *Widman,* 413 Ill. 448, 109 N.E.2d 765 (1952), *Ziese* v. *Ramada Inns,* 463 F.2d 1058 (7th Cir., 1972), and *Ehret Co.* v. *Eaton, Yale & Towne, Inc.*, 523 F.2d 280 (7th Cir., 1975).

As already stated, the petitioners' complaint does not allege that the respondents or any Village official ever affirmatively represented or promised them that they

would be permitted to reside outside the Village during the period they were employed by the Village. Therefore, even assuming that the doctrine of promissory estoppel could be invoked against a municipality, in the absence of an allegation that there was a promise or affirmative representation, the doctrine of promissory estoppel cannot apply and cannot confer any sort of vested right on the petitioners.

The assertion made in the Petition for a Writ of Certiorari that the petitioners have a vested right to reside outside the Village has no basis in law or fact. The petitioners do not have any contractual right, express or implied to reside outside the Village. The doctrine of promissory estoppel cannot be invoked to provide them with such a right. What the petitioners had, at most, was an expectancy that because they had not been required to live within the Village in the past, they would not be required to live within the Village in the future. It is well established that such an expectancy does not constitute a vested right.

IV.

THE CHALLENGED ORDINANCE IS NOT A RETROSPECTIVE LAW AND EVEN IF IT WERE, IT WOULD NOT BE UNCONSTITUTIONAL.

The petitioners assert that the challenged ordinance is a retrospective law. It is not. The ordinance requires present Village employees to establish residency in the Village by a specified future date. The ordinance does not penalize present Village employees for having resided outside the Village in the past. It only requires them to reside in the Village in the future. If an individual is charged with violating the ordinance, it will not be because he or she resided outside the Village before the

ordinance was passed, it will be because he or she would have continued to reside outside the Village after the period which the ordinance gives present employees to establish residency within the Village expires.

Furthermore, even if the challenged ordinance is a retrospective law, it is not invalid. A retrospective law is invalid only if it deprives an individual of a vested right or if it constitutes an ex post facto law in violation of Article I, Section 10 of the United States Constitution.

As established above, the petitioners do not have a vested right to reside outside the Village and hence the challenged ordinance cannot deprive them of a vested right.

The challenged ordinance is not an ex post facto law. Not all retrospective laws are ex post facto laws. 2 *Sutherland, Statutory Construction,* Section 41.03 (4th Ed., 1973). In order for a law to violate the constitutional prohibition against the enactment of ex post facto laws, the law must not only be retrospective, but its purpose must also be punitive. *Dean* v. *Braisted,* 363 U.S. 144, 80 S.Ct. 1146 (1960). In *Galvan* v. *Press,* 347 U.S. 522, 74 S.Ct. 737 (1954), rehearing denied, 348 U.S. 852, 75 S.Ct. 17 (1954), this Court upheld a deportation order and reaffirmed the longstanding doctrine that the prohibition against the enactment of ex post facto laws applies only to legislation which imposes a penalty that is criminal in nature. Likewise, in *Garner* v. *Board of Public Works of the City of Los Angeles,* 341 U.S. 716, 71 S.Ct. 909 (1951), rehearing denied 342 U.S. 843, 72 S.Ct. 21 (1951), this Court upheld an ordinance requiring employees to take a loyalty oath, ruling that an ordinance did not constitute an ex post facto law unless it imposed a punishment for conduct which was lawful at the time it was engaged in.

The challenged ordinance does not punish Village employees for conduct which was lawful at the time it was engaged in. Furthermore, the ordinance does not impose a jail term, fine or other similar penalty on officers and employees who violate its provisions.

This court's decisions in *Greene* v. *United States,* 376 U.S. 149, 845 S.Ct. 615 (1963), and *Union Pacific Railroad Co.,* v. *Laramie Stockyards Co.,* 231 U.S. 190, 34 S.Ct. 101 (1913), relied on by the petitioners for their assertion that the challenged ordinance is invalid because it is retrospective are inapposite to this case. These cases only state a principle of statutory construction, namely, that a statute will not be construed to apply retrospectively unless retrospective application was clearly intended by the Legislature. If the challenged ordinance is retrospective because it requires present Village employees who reside outside the Village to establish residency within the Village, then there is no question that it was intended to apply retrospectively.

V.

THE CHALLENGED ORDINANCE DOES NOT IMPAIR THE OBLIGATION OF A CONTRACT IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION.

The petitioners also contend that the challenged ordinance violates the provision of Article I, Section 10 of the United States Constitution which prohibits the enactment of laws that impair the obligation of contracts. Obviously, for this constitutional provision to be applicable, there must first be a contractual right. This Court recognized this in the case of *Keefe* v. *Clark,* 322 U.S. 393, 64 S.Ct. 1072 (1944), when it stated:

> Before we can find impairment of a contract, we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed. 322 U.S. at 396.

The petitioners do not have a contractual right to reside outside the Village. Therefore, it is impossible for them to establish clearly and unequivocally that the challenged ordinance impairs an obligation of their employment contracts with the Village.

The petitioners' reliance on the decision in *United States Trust Co. of New York* v. *New Jersey,* 431 U.S. 1, 97 S.Ct. 1505 (1977), is misplaced. This decision held that New Jersey's repeal of a statute impaired the obligation of that state's contract with holders of New York Port Authority Bonds. Involved in the case was a statutory covenant made between two states, New York and New Jersey, and the bondholders. The repealed statute specifically provided:

> The 2 States covenant and agree with each other and with the holders of any affected bonds . . . (See, 431 U.S. at 9)

In the present case, there is no such statutory covenant. Section I(B)(2) of the Personnel Code, which is the only statutory provision which the petitioners rely on for their claim that they have a right to reside outside the Village does not purport to create any contractual right as did the New Jersey statute. Furthermore, it is significant that the opinion in *United States Trust Company of New York* v. *New Jersey* expressly stated:

> Yet the contract clause does not prohibit the states from repealing or amending statutes generally or from enacting legislation with retroactive effects. 431 U.S. at 17

VI.

PENDENT JURISDICTION DOES NOT EXIST TO ALLOW A FEDERAL COURT TO CONSIDER ANY CLAIMS THE PETITIONERS MIGHT HAVE WHICH ARISE UNDER STATE LAW.

The final point relied on by the petitioners is that the District Court should have considered the petitioners' claims arising under state law even though the court found that the petitioners' complaint did not state any cause of action under federal law. This argument ignores the statement in *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 86 S.Ct. 1130 (1966), that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726.

Furthermore, the *United Mine Workers* v. *Gibbs* decision expressly stated:

> Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. 383 U.S. at 726.

This is exactly what occurred in this case. The petitioners' federal claims were dismissed before trial by the District Court pursuant to the respondent's 12(b)(6) motion. The District Court properly exercised its discretion and refused to hear whatever state claims may have been asserted in the petitioner's complaint.

CONCLUSION

This case does not raise any issues of federal law which need to be decided by this court. This Court and other courts have already considered the constitutionality of municipal residency requirements and have held them to be valid.

The collateral arguments made by the petitioners do not raise any new unanswered questions of law. Applying well established legal principles, it is clear that the petitioners do not have any vested right to reside outside the Village. Likewise, the prior decisions of this court determine decisively that even if the challenged ordinance is considered to be retrospective, as asserted by the petitioners, it is still not unconstitutional as either an ex post facto law or a law which impairs the obligation of a contract. In short, the arguments made by the plaintiffs have been made before and have been determined contrary to the petitioners' position. There is no reason for this Court to reconsider these decisions.

Respondents, Board of Trustees of the Village of Maywood, et al., respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
CIVIL ACTION
NO. 76C1051

FRANK ANDRE, RAYMOND BILLINGS, JOHN CADIGAN, LE ROY CAMERON, DONALD CONWAY, KEVIN CONWAY, GEORGE DANNER, JOSEPH DEMARCO, MICHAEL DRAVO, THOMAS DUFFY, RICHARD EWALT, ROBERT GRACE, GEORGE GREENE, RAY HALEY, ROBERT HOOSER, WARREN KUHN, RONALD LIEBMANN, CHARLES LOCKWOOD, ROBERT MATTHEWS, FRANK MENNELL, DENNIS MILLER, LAWRENCE MILLER, HUGH MORRISON, LE ROY MUMBOWER, WILBURN MUMBOWER, EUGENE PENCE, STEVEN PERSICO, WAYNE PIERCE, RICHARD PLETT, DENNIS PONTE, CARL SAGMEISTER, WILBERT SAMUEL, EARL SCHODTLER, MARK SPANDIKOW, GLENN STADTMAN, DONALD STEFKA, RAYMOND TROCHELMAN, SAM VENTRELLA, JOHN WACHAL, HERBERT WIEGEL, Individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

BOARD OF TRUSTEES OF THE VILLAGE OF MAYWOOD, COOK COUNTY, ILLINOIS; DAVID WHITE, ROBERT SCALES, HAROLD JACKSON, HUGH MUIR, THOMAS McCARTHY, DORIS STRIETER and WILLIAN HARPER, individually and as members of the Defendant Board of Trustees, and the VILLAGE OF MAYWOOD, a municipal corporation,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Plaintiffs by their attorneys, Lawrence Jay Weiner and Saul R. Wexler, complaining of defendants state:

Jurisdiction

1. This action is brought pursuant to 42 U.S.C. §1983, the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, the ex post facto and impairment of the obligation of contracts clauses of Article I, §10, Cls. 1 of the Constitution of the United States, and 28 U.S.C. §§2201 and 2202. Jurisdiction is conferred pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201, 2202, 1331 and 1343. The amount in controversy exclusive of interest and costs reasonably exceeds $10,000.00.

The Parties

2. Plaintiffs Frank Andre, Raymond Billings, John Cadigan, Donald Conway, George Danner, Michael Dravo, Robert Hooser, Warren Kuhn, Ronald Liebmann, Charles Lockwood, Frank Mennell, Dennis Miller, Lawrence Miller, Hugh Morrison, LeRoy Mumbower, Wilburn Mumbower, Eugene Pence, Steven Persico, Richard Plett, Dennis Ponte, Carl Sagmeister, Mark Spandikow, Glenn Stadtman, Donald Stefka, Raymond Trochelman, Sam Ventrella and John Wachal at all times pertinent hereto were and are employees of the Fire Department of the Village of Maywood, Cook County, Illinois.

3. Plaintiffs LeRoy Cameron, Joseph DeMarco, Thomas Duffy, Richard Ewalt, Robert Grace, George Greene, Ray Haley, Robert Matthews, Wayne Pierce, Wilbert Samuel, Earl Schodtler, and Herbert Wiegel, at all times pertinent hereto were and are employees of the Police Department of the Village of Maywood, Cook County, Illinois.

4. The plaintiffs bring this action in their own behalf and as a class action in a representative capacity on behalf of all similarly situated employees of the defendants. All plaintiffs and the class represented thereby, are equally affected by the acts of the defendants and the relief hereinafter sought is for the benefit of the named and class plaintiffs.

5. The issues involved in this cause present common issues of law and fact, or alternatively, the common issues of law and fact predominate over any variations which may exist between individual members of the class. The plaintiffs and the class represented thereby have a community of interest in the subject matter and the remedies sought. The plaintiffs are able to fairly and adequately represent the interests of the class. If individual actions were required to be brought by each member of the class injured or affected by the illegal and unconstitutional actions of the defendants, as hereinafter alleged, an unnecessary multiplicity of lawsuits and possible inconsistent judgments would result, thereby creating great hardship to the plaintiffs and the class represented thereby, as well as to the Court, and to the defendants.

6. Defendant Board of Trustees of the Village of Maywood, Cook County, Illinois, at all times pertinent hereto was and is a public body duly constituted and existing pursuant to the laws of the State of Illinois, and responsible for the operation and governance of the Village of Maywood, Cook County, Illinois.

7. Defendants David White, Robert Scales, Harold Jackson, Hugh Muir, Thomas McCarthy, Doris Strieter and William Harper, at all times pertinent hereto were and are the members of the defendant Board of Trustees.

8. Defendant Village of Maywood, is a municipal corporation, incorporated and existing pursuant to the laws of the State of Illinois.

Cause of Action

9. On August 14, 1975, the defendants passed and adopted the following Ordinance:

"ORDINANCE NO. CO-75-9

VILLAGE OF MAYWOOD

AN ORDINANCE ESTABLISHING RESIDENCY REQUIREMENTS FOR PRESENT EMPLOYEES AND PRESENT OFFICERS OF THE VILLAGE OF MAYWOOD

"Be It Ordained By The President And Board Of Trustees Of The Village Of Maywood, Cook County, Illinois, A Home Rule Municipality, And As An Exercise Of Its Home Rule Authority, as follows:

"Section One: That Chapter 36 of the Maywood Village Code, 1955, as amended, be and the same is hereby further amended by adding thereto additional sections which shall read as follows:

"Section Two: That is is hereby declared the policy of the Corporate Authorities of the Village of Maywood that all employees, department heads, supervisory and administrative personnel and appointed officers, paid either on an hourly or salaried basis be, and the same

are hereby required, to reside within the Village of Maywood throughout their terms of office and/or length of employment, but with the express exclusion of those persons supplying services on a limited contractual basis who are actually in the employ of another governmental unit and/or private organization.

"Section Three: That all department heads and administrative personnel currently employed or appointed by the Village of Maywood who have not resided within the Village prior to the adoption of this ordinance shall be required by the Corporate Authorities to establish residency within the Village of Maywood no later than two (2) years after the date of passage of this ordinance.

"Section Four: That all other employees and officers employed by the Village of Maywood who have not resided within the Village prior to the adoption of this ordinance shall be required by the Corporate Authorities to establish residency within the Village of Maywood no later than four (4) years after the date of passage of this ordinance.

"Section Five: That non-compliance with the residency requirements set forth in this ordinance by any officer or employee of the Village of Maywood shall constitute grounds for immediate dismissal. The Village Manager is hereby directed to invoke such penalty of immediate dismissal or to take such action as is necessary to bring about dismissal upon failure to comply within the terms prescribed in Sections Three and Four above.

"Section Six: That all requirements set forth in the Village of Maywood Personnel Manual, except where they conflict with the terms of this ordinance, are in full force and effect.

"Section Seven: That the Village Manager, at his discretion, may waive any residency requirement for any officer or employee due to documented extenuating circumstances or where such office of employment requires special technical training or knowledge. Under no circumstances shall the residency requirement be waived for more than one year beyond the allotted time period without formal approval by the Village Board.

"Section Eight: That enforcement of this ordinance shall be solely under the jurisdiction of the Village Manager in his capacity as Chief Administrative Officer of the Village and the Village Manager shall, immediately after passage of this ordinance, inform all officers and employees, in writing, of the full terms of this ordinance.

"Section Nine: That all ordinances or parts of ordinances in conflict herewith are to the extent of such conflict hereby repealed.

"Section Ten: That this ordinance shall be in full force and effect from and after its passage, approval and publication in pamphlet form as provided by law.

Passed this 14th day of August A.D., 1976.

Ayes: 4

Nays: 3"

10. Plaintiffs and the class represented thereby, are employees and/or officers currently employed by defendants, and who were employed thereby prior to the adoption of the aforesaid ordinance.

11. Prior to the adoption of said ordinance, residency within the Village of Maywood was not a prerequities (sic) to and/or term or condition of subsequent and continued employment of plaintiffs, or the class represented thereby.

12. Prior to the adoption of said ordinance, no ordinance, rule, regulation, policy or established practice, nor the collective bargaining agreements between the defendants and the labor organizations representing plaintiffs, and the class represented thereby, contained any requirement that said employees reside within the Village of Maywood.

13. No advertizements (sic) for employment, recruitment of, and representations to prospective employees, and offers and individual contracts of employment of plaintiffs, and the class represented thereby, contained any requirement that said employees reside within the Village of Maywood as a prerequisite to and/or term or condition of subsequent and continued employment.

14. Plaintiffs, and the class represented thereby, accepted their offers of employment, and commenced and continued said employment upon the expectancy and in reliance that no such residency had been, was, or would thereafter be required as a term and condition of further, future and continued employment.

15. The terms and conditions of employment as agreed to and understood between defendants and plaintiffs, and the class represented thereby, contained no such residency requirement and the omission thereof became a vested, contractual right, and binding and enforceable term and condition of employment.

16. In addition, by reason of the aforesaid relationship and reliance, plaintiffs, and the class represented thereby, some for periods in excess of 20 years, have *inter alia* purchased and improved homes, entered into long term apartment leases, enrolled their children in schools, their

spouses obtained employment, they and their families established friendships and other relationships, and became involved in community affairs and organizations, and otherwise became an integral part of and materially and substantially established themselves and their families in their local communities wherein they resided outside of the Village of Maywood, all of which was with the knowledge and previous consent of defendants.

16. A substantial and significant proportion of the employees of defendants, and with the knowledge and previous consent thereof, have not and presently do not reside within the Village of Maywood, including but not limited to approximately 85% of the fire department personnel and 50% of the police department personnel—adequate staffs of which are at all times required and properly maintained within said Village for the purpose of fire and police protection.

Ex Post Facto

17. The aforesaid action of the defendants effected the passing of and constituted an ex post facto law, prohibited under Article 1, §10, Cls. 1 of the Constitution of the United States.

Breach and Impairment of Contracts

18. The aforesaid action of the defendants constituted a breach of the employment relationship and contracts of plaintiffs, and the class represented thereby, effected a unilateral and ex parte change and modification of their established and vested contractual rights, and the binding and enforceable terms and conditions of their employment, in violation and derogation of the common law and the prohibition against any law impairing the obligation of contracts under Article 1, §10, Cls. 1 of the Constitution of the United States.

Due Process and Equal Protection

19. The aforesaid action of the defendants was arbitrary capricious and discriminatory and lacked and was devoid and not in furtherance of any substantial, rational, reasonable and/or compelling relationship to any legitimate governmental interest, purpose or objective, in violation and derogation of due process of law and the equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution of the United States.

20. The aforesaid action of the defendants penalized and penalizes, chills, impairs and interferes with plaintiffs, and the class represented thereby, in the exercise of their fundamental constitutional rights to freely travel, migrate and settle, and to live and conduct their private and family affairs and business where, how, and as they so choose, in violation and derogation of the Equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution of the United States.

21. The aforesaid action of the defendants created, established and imposed a conclusive and irrefutable presumption, automatically constituting grounds for and requiring dismissal, that plaintiffs, and the class represented thereby, can not properly perform their duties unless they reside within the Village of Maywood, in violation and derogation of due process of law guaranteed under the Fourteenth Amendment to the Constitution of the United States.

22. The aforesaid action of defendants changed, modified, impaired, abrogated and/or vitiated rules, regulations, policies, contracts and/or established practices, which created a legitimate expectancy of continued employment irrespective of whether personnel resided within or without the Village of Maywood, and adversely affected

the terms and conditions of employment, without affording prior thereto plaintiffs, and the class represented thereby, a hearing and the other minimum requirements of procedural due process, in violation and derogation of due process of law guaranteed under the Fourteenth Amendment to the Constitution of the United States.

23. The aforesaid action of defendants is internally inconsistent and varying, establishing different time schedules and containing discretionary waiver provisions, which differentiations and classifications have no rational basis and/or inherently suspect and/or infringe upon fundamental rights and are not necessary to promote compelling state interests, in violation and derogation of the equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution of the United States.

Overbreath

24. The action of the defendants includes and applies to all employees, department heads, supervisory and administrative personnel and appointed officers, paid either on an hourly or salaried basis, excluding only those persons supplying services on a limited contractual basis who are actually in the employ of another governmental unit and/or private organization and said ordinance is thereby constitutionally overbroad and too inclusive in its restrictions and application.

Vagueness

25. The action of defendants is capable of varying meanings and understandings, and unclear to reasonable persons with respect to its intent and application, including, but not limited to, its provisions contained in Section 4 of said ordinance relating to "employees and officers currently employed by the Village of Maywood" (plaintiffs believing that said Village is not the employing entity) and relating to those "who have not resided within the Village" (plaintiff being unclear as to whether any employees who in fact had resided in the Village of Maywood prior to the adoption of the ordinance are excluded thereby from its application), and said ordinance is thereby constitutionally deficient by reason of vagueness.

26. Defendants knew, and/or had reason to believe and/or should have known that the aforesaid action thereof was in derogation and violation, and/or interfered with, impaired and/or chilled plaintiffs, and the class represented thereby, in the exercise of the constitutional rights and protected freedoms as aforesaid.

27. By reason of the action of defendants, plaintiffs, and the class represented thereby, have suffered substantial harm, loss and damages in an amount in excess of $10,000, and will suffer greater and more substantial and irreparable harm, loss and damages in the event such ordinance is permitted to remain in full force and effect, including but not limited to dismissal, and/or forced sale of their homes and the disruption of their private, personal and family living.

28. Plaintiffs have no adequate remedy at law.

Prayer

WHEREFORE, plaintiffs respectfully pray that:

1. The Court declare and find that the constitutional rights and protected freedoms of plaintiffs, and the class represented thereby, have been violated by defendants.

2. The Court declare and find that Ordinance No. CO-75-9 is unconstitutional, null and void and of no force or effect.

3. A judgment be entered in favor of plaintiffs and against defendants for any and all actual and compensatory damages found to be occasioned thereby.

4. A judgment be entered in favor of plaintiffs for punitive and exemplary damages, against the defendant Village of Maywood, the defendant Board of Trustees, and each of the individual defendants, individually and as members thereof, in the amount of $25,000 against each defendant.

5. During the pendendancy (sic) of this lawsuit, the defendants and all persons within their employ or under their control or supervision be restrained and enjoined from applying and/or enforcing the aforesaid Ordinance; and upon the final determination of this matter, that said injunction be made permanent.

6. The Court award plaintiffs the costs, expenses and disbursements of this cause, including reasonable attorneys' fees.

7. The Court award such other and further relief as may be just, equitable and proper.

FRANK ANDRE, et al., Plaintiffs
By: _____
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